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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of: Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Anti-trafficking Provisions and Cross-Ownership Limitations	MM Docket No. 92-264

COMMENTS OF

TIME WARNER ENTERTAINMENT COMPANY, L.P.

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TABLE OF CONTENTS

SUMMARY

The purpose and necessity of the three year holding requirement is unclear, particularly in light of the numerous provisions in the 1992 Cable Act which deal directly with the perceived adverse consequences to consumers from alleged "trafficking" in cable systems.

- Public policy demands a limited scope of application given the potential interference with fundamental property rights.

- Fairness calls for "grandfathering" systems constructed or acquired prior to the enactment of the 1992 Cable Act or, at the very least, transactions pending on October 5, 1992, to prevent inappropriate retroactive impact.

- Only "substantial", not pro forma, changes in control under Sections 309(c)(2)(B) and 310(d) of the Communications Act of 1934, should be subject to the three year holding requirement.

- Neither a fixed ownership threshold nor the Commission's attribution criteria should be determinative of whether the three year holding requirement is satisfied.

- "Initial construction" is complete when a cable system serves its first customer. This "bright line" test is consistent with Congressional intent, and will avoid unnecessary disputes between system operators and franchising authorities. The Commission should not refer to local franchise agreements (i.e., their concepts of initial service, line extensions or rebuilds). To do so would increase disputes, delays and inconsistencies.

- A single technically integrated system covering multiple franchise areas should measure the three year period beginning with when the transferor first served any franchise area served by that system.

- The holding period for multiple systems being transferred as a group should be subject to a materiality threshold. If at least 50% of the subscribers served by that group are served by systems that satisfy the three year holding requirement, then

the group should be deemed to have satisfied the three year holding requirement. In addition, establishment of materiality thresholds or the use of waivers should permit transfers involving diversified entities that are not primarily cable system operators.

- Transfer of a system subsequent to its initial sale that was expressly contemplated by the terms of, or implicitly necessary because of, the initial sale should be considered part of the initial sale and not subject to a separate three year holding requirement.

The Commission should identify broad categories of transactions that are within the three statutory exceptions to the holding requirement.

- The "tax free" exception should apply to: transactions involving tax certificates under section 1071 of the Internal Revenue Code (the "Code"); reorganizations under section 368 of the Code; contributions to capital under section 351 of the Code; and exchanges under section 1031 of the Code if the "boot" is less than 50% of the value.

- Involuntary transfers required by any applicable law or regulation of any proper federal, state or local governmental authority (including but not limited to transfers necessary to comply with the Commission's policies implementing Section 11 of the 1992 Cable Act) or any transfer ordered or sanctioned by a court (*e.g.*, in a bankruptcy, divorce or probate proceeding) should be exempt. This exception includes but is *not* limited to divestitures legitimately forced by the franchising authority, bankruptcy or receivership.

- Only a similarly involuntary transfer of a municipally operated system should be exempt under the involuntary transfer exception. Voluntary municipal transfers should be subject to the same restrictions as private cable systems.

- Any *pro forma* transfer, affiliate transfer or similar reorganization should be exempt, so long as ultimate control remains unchanged.

The Commission has general authority to waive the holding requirement "in the public interest." Although Congress directed that this authority be used in cases of financial distress, the Commission's waiver authority is not limited to such cases.

- The Commission should establish a liberal waiver policy, effected on a case-by-case basis.
- Criteria for "financial distress" cases should be established in accordance with comparable Commission precedent, and applied liberally.
- If a local authority approves a transfer, there should be a presumption that a Commission waiver would be in the public interest.
- The Commission may grant a waiver prior, but subject, to receipt of any necessary local approval.

Only the Commission has the authority, expertise, policy and resources necessary to uniformly enforce the anti-trafficking rules.

- Local authorities (and local federal and state courts) were not given, and should not have, any jurisdiction to enforce or interpret these rules.
- Rescission of a transaction should be required only in the case of a truly egregious violation.
- System operators should be allowed to complete transfers that they believe in good faith either satisfy or are exempt from the three year holding requirement.

Congress, in order to establish consistency and preclude abuses, has preemptively established that 120 days is a reasonable time for a franchising authority to provide any necessary consent or denial to a transfer or assignment of a cable system.

- The Commission must establish preemptive information requirements that, when filed with the franchising authority together with additional information specifically required by the franchise agreement, will start the 120 day clock.

- Only limited information specifically regarding the transferee's qualifications is relevant. Historical or pro forma financial information, changes proposed for the system and the consideration of rates are all inappropriate in a franchise transfer proceeding.

- The 120 day rule applies to any and all required local approvals for transfers or assignments, including sequential local and state approvals.

The Commission's present cable/MMDS cross-ownership regulations effectively implement the 1992 Cable Act's prohibitions. The Commission should interpret the 1992 Cable Act's cable/SMATV cross-ownership prohibition to apply only if all statutory elements are present.

- The SMATV prohibition only applies to: (1) unfranchised SMATV service and not to franchised cable service provided over a SMATV-like facility; (2) SMATV systems that are not interconnected with cable systems via hardwire or non-hardwire means; or (3) SMATV service provided within the portion of the cable operator's cable franchise area actually served by the cable system.

- The Commission may and should retain its existing public interest waiver standards, including its exceptions for rural areas and local programming, for cable/MMDS cross-ownership and extend them to cable/SMATV cross-ownership.

- The Commission should adopt a blanket waiver for cable/SMATV in any community where 15% of MDU residents receive SMATV service from a SMATV operator.

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INTRODUCTION

Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, hereby respectfully submits these comments to the Federal Communications Commission (the "Commission") in response to Sections III and IV (relating to sales of cable systems, and cross-ownership between cable systems and MMDS or SMATV systems, respectively) of the Commission's Notice of Proposed Rulemaking in MM Docket No. 92-264 ("Notice").[1] Simultaneously herewith, Time Warner is submitting separate comments in response to Sections V, VI and VII of the Notice (relating to subscriber limits, channel occupancy limits and participation in program production).

Time Warner is a partnership, which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a corporation whose securities are publicly traded. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, which operates cable systems; Home Box Office, which operates pay television programming services; and Warner Bros., which produces and distributes motion pictures and television programs.

Time Warner is the plaintiff in a lawsuit pending in Federal District Court in Washington, D.C., in which it takes the position, *inter alia*, that Section 11 and other provisions of the Cable Television Consumer Protection and Competition Act of

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[1] Notice of Proposed Rulemaking and Notice of Inquiry (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-trafficking Provisions), MM Docket No. 92-264, FCC 92-542, ___ FCC Rcd. ____ (released December 28, 1992).

1992[2] violate its rights under the First Amendment to the United States Constitution.[3] Time Warner submits these comments without prejudice to its claims and arguments in that lawsuit.

I. ANTI-TRAFFICKING RULES

A. The purpose and necessity of the three year holding requirement in Section 617(a) is unclear.

Time Warner shares the bewilderment the Commission expresses in the Notice as to the true intent and purpose of the three year holding requirement for cable systems imposed by Section 13 of the 1992 Cable Act.[4] The Commission correctly recognized that neither the 1992 Cable Act nor its legislative history makes clear the underlying rationale or intent of Congress for imposing such restriction.[5] The House Report suggests only that Congress

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[2]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act").

[3]See Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C. filed November 5, 1992).

[4]Section 13 of the 1992 Cable Act adds a new § 617 (Section 13 (47 U.S.C. § 537(a)) is referred to hereinafter as "Section 617") to the Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq. ("Communications Act of 1934"). Section 617(a) prohibits the sale or transfer of ownership in a cable system within three years following its acquisition or initial construction, subject to certain exceptions pursuant to § 617(b) and (c), and waiver authority vested in the Commission pursuant to Section 617(d). Section 617(e) limits to 120 days the duration of a franchising authority's power to disapprove transfers.

[5]See Notice at ¶ 4 and, in particular, legislative history cited at footnote 4 therein.

intended this provision to restrict "profiteering" transactions, without defining profiteering.[6]

The concerns of Congress as to trafficking may reflect its speculation that acquisition activity in the industry in the 1980s generally had an adverse effect on consumers. While Time Warner disputes such speculation, it must nevertheless be recognized that the general conditions that gave rise to significant buying and trading activity in the cable industry in the second half of the 1980s have no relevance today.[7] Unlike in recent years, overall positive economic conditions were then present while regulatory constraints were minimal. These factors prompted changes in the financial markets, which resulted in high levels of merger and acquisition activity in many industries.

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[6]See House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. (1991) ("1991 House Report"), at p. 119; and House Committee on Energy and Commerce, H.R. Rep. No. 682, 101st Cong., 2d Sess. (1990) ("1990 House Report"), at p. 117.

[7]In Transfer of Broadcast Facilities, Report and Order, 52 RR 2d 1081 (1982), the Commission eliminated a three year holding requirement for licenses for operating broadcast facilities. Having questioned the effectiveness and appropriateness of a three year holding requirement as a deterrent to trafficking in such licenses, the Commission concluded that the market environment had changed so significantly that the holding requirement had outlived whatever, if any, validity and utility it might have had, and that its application to operating broadcast facilities might in fact have negative effects. Id. at ¶¶ 2-6 and 21-22. The Commission noted that the requirement interfered with market forces in such a way that it might in fact cause a deterioration of service, deter investment in broadcasting and increase station prices by artificially limiting the number of properties available for sale. Id. at ¶¶ 23-24.

The three year holding requirement imposes significant restrictions on an important benefit of property ownership -- the right of alienability. As a matter of public policy, restrictions on alienability should be applied narrowly and only to the extent reasonably necessary to attain the Congressional purpose behind adoption of the restriction. Moreover, the 1992 Cable Act contains numerous provisions which seek to deal directly with the perceived adverse consequences to consumers from alleged trafficking in cable systems.[8] Accordingly, given the apparent lack of rationale for the three year holding period, Commission regulations should not be unduly rigorous.

B. The Commission should "grandfather" transactions pending when the 1992 Cable Act became effective.

Time Warner notes that the FCC implicitly assumes in the Notice that the three year holding requirement applies to all cable systems, irrespective of when they were acquired or constructed by the present owner. Time Warner questions the fairness of the applicability of this restriction to systems acquired or constructed prior to effectiveness of the Act and strongly encourages the Commission to adopt regulations excluding

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[8] See, e.g., §§ 623, 612 and 622(c) of the Communications Act of 1934, as amended by §§ 3, 9 and 14, respectively, of the 1992 Cable Act (rate regulation provisions); and Notice of Proposed Rulemaking (Rate Regulation), MM Docket No. 92-266, FCC 92-544, ___ FCC Rcd ___ (released December 24, 1992) ("Rate Regulation Notice"). See also §§ 632 (Consumer Protection and Customer Service), 621 (Competitive Franchises) and 624 (Technical Standards; Emergency Announcements; Programming Changes; Home Wiring) of the Communications Act of 1934, as amended by §§ 8, 7 and 16, respectively, of the 1992 Cable Act.

such systems from this restriction, if not absolutely then through a liberal waiver policy. The arguably retroactive effect of Section 617(a) demands a cautious approach to its implementation, particularly in light of the other means to assure reasonable rates and satisfactory service inherent in the 1992 Cable Act.

> Retroactive measures -- whether promulgated by a legislature or by an administrative agency -- have traditionally been subjected to stricter scrutiny than have prospective measures. Thus. . . the validity of a prospective regulation by an administrative agency "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" In contrast, "courts have generally compared the public interest in the retroactive rule with the private interests that are overturned by it" in deciding whether to uphold a retroactive promulgation. Such disparate treatment is justified because retroactive laws interfere with the legally-induced and settled expectations of provide parties to a greater extent than do prospective enactments.[9]

Furthermore, "[r]etroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application. . . or when the hardship on affected parties will outweigh the public ends to be accomplished."[10]

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[9] Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1259-60 (3d Cir. 1978) (footnotes omitted; quoting Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973)) (quoting Thorpe v. Housing Authority, 393 U.S. 268, 280-81 (1969)); Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977)).

[10] Iowa Power and Light Co. v. Burlington Northern, Inc., 590 F.2d 796, 812 (8th Cir. 1981) (citations omitted), cert. denied, 455 U.S. 907 (1982). See also Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless

(continued...)

At a minimum, the Commission should effectively grandfather transactions that might otherwise violate the three year holding requirement if such transactions were the subject of written agreements in principle or definitive agreements in existence prior to the enactment of the 1992 Cable Act.[11] All such preexisting contractual arrangements should be fully enforceable as legally and validly agreed to by the parties based on their legitimate expectations at the time of their agreement. Such transactions, regardless of when they are consummated, should not be subject to Section 617(a) or any Commission regulations or policies implemented pursuant thereto.[12] To do otherwise would

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[10](...continued) their language requires this result."); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986) (When parties have relied on a lawful regulation and planned their activities accordingly, retroactive modification of the regulation can cause "great mischief," which must be balanced against any salutary effects of retroactivity); and United States v. Exxon Corp, 561 F. Supp. 816, 836 (D. D.C. 1983) ("Among the factors weighing in the balance are the extent to which a party has relied on previously settled law and the burden which the retroactive rule would impose on a party."), aff'd, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986).

[11]Cable system operators were on notice of the three year holding requirement when the 1992 Cable Act was enacted on October 5, 1992, the date Congress overrode the President's veto, even though the anti-trafficking rules actually became effective on December 4, 1992, pursuant to Section 28 of the 1992 Cable Act since § 617(a) contains no specific effective date. Section 617(e), however, will not become effective until Commission regulations contemplated thereby have been adopted. See Notice at ¶ 3.

[12]This "grandfathering" could be effected in one of three ways. The Commission could: define a transfer of ownership under § 617(a) to exclude such transactions; interpret the "operation of any law" exception in § 617(c)(2) to provide that such (continued...)

clearly permit retroactive interference with vested contractual rights relating to specific efforts to alienate property. The resultant hardships on the parties to such agreements would clearly outweigh the uncertain public ends that application of this rule to such agreements might accomplish.

C. Transfers of ownership subject to the three year holding requirement.

1. Only those transfers of ownership that result in a "substantial" change in ownership should be subject to the anti-trafficking provision.

The Commission seeks comment on the types of ownership changes to which the three-year holding period should apply.[13] Time Warner submits that a test similar to the test employed by the Commission under Sections 310(d) and 309(c)(2)(B) of the Communications Act of 1934[14] is appropriate to determine which transfers are subject to Section 617(a). Transfers of ownership interests that do not result in a "substantial" change in control (i.e., pro forma transfers) should not be subject to the anti-trafficking restriction. Section 617(c)(3) already clearly provides that the restriction does not apply to "any sale, assignment or transfer, to one or more purchasers, assignees, or transferees controlled by, controlling or under common control

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[12](...continued) arrangements are, in effect, legal necessities; or use its waiver authority under § 617(d) to grandfather this category of transactions.

[13]See Notice at ¶ 9

[14]47 U.S.C. §§ 309(c)(2)(B) and 310(d).

with, the seller, assignor, or transferor." It is, therefore, apparent that in applying the anti-trafficking rule, Congress was careful not to restrict these "pro forma" transfers.

In determining what is a substantial and what is a pro forma change in control for purposes of Section 617(a), the Commission could refer to the many precedents established under Sections 310(d) and 309(c)(2)(B) of the Communications Act of 1934 for guidance in determining what transfers should be restricted by the three year holding requirement.[15] These precedents recognize that a substantial change in control occurs when a new party becomes able to determine policy and to control managerial and operating decisions, which generally only occurs if there is a change in actual voting control. Since the legislative history suggests that the sole purpose of the anti-trafficking provision is to prevent profiteering and in light of the pervasive regulatory approach that the 1992 Cable Act effects,[16] Time Warner urges the Commission to specifically limit the three year

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[15]See, e.g., Barnes Enterprises, Inc., 55 FCC 2d 721 (1975) (The Commission found that where less than 50% of the stock changed hands, and more than 50% of the stock remained in the hands of existing owners, the transaction should be treated as a pro forma change in control.). See also McCaw Cellular Communications, Inc., 4 FCC Rcd 2866, ¶ 33 (1989); and Metromedia, Inc., 98 FCC 2d 300, 307 (1984). Time Warner believes that the use of a similar criteria developed by the Commission as to what constitutes a substantial transfer of ownership should be used to identify clearly those transactions that should and should not be subject to the anti-trafficking rule.

[16]See 1991 House Report at p. 119. See also discussion at Section I.A (in particular, footnotes 6 and 8 therein, and related text), supra.

holding requirement to substantial ownership changes as defined under well established Commission precedent.

2. A fixed ownership test or threshold would not be desirable.

Time Warner believes that establishing a threshold for changes in ownership subject to Section 617(a) would not be desirable. The Commission has rejected the use of fixed ownership tests or thresholds in the broadcast context.[17] While the establishment of a fixed transfer of ownership threshold has the advantage of establishing a bright line, the establishment of too low a threshold (such as those provided for in the attribution rules discussed hereinafter) could cause undue disruption in the capital markets available to cable operators by causing needless delays and reductions in investment liquidity, and could limit a failing cable operator's ability to obtain new capital or management.[18]

Application of a fixed ownership threshold for the transfer of ownership interests in cable systems would be problematic given the great diversity and complexity of ownership structures that exist in the cable industry, including publicly traded

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[17]See S. Sewell, Assignments and Transfer of Control of FCC Authorizations Under Section 310(d) of The Communications Act of 1934, 43 Fed. Com. L. J. 277, 296 (1991) ("The ascertainment of control in most instances must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented." Stereo Broadcasters, Inc., 55 FCC 2d 819, 821 (1975), modified, 59 FCC 2d 1002 (1976).).

[18]See Transfer of Broadcast Facilities, 52 RR 2d at 1084, 1087.

partnerships and joint ventures. In general, but particularly in light of complex ownership structures, a specific ownership interest or percentage equity stake often bears no relationship to actual control.

Time Warner believes that the attribution criteria contained in Section 73.3555 of the Commission's Rules are inappropriate to determine whether a transfer has occurred for purposes of Section 617(a). The concept of attributable interest simply sweeps too broadly. As the Commission acknowledged in the Notice,[19] the attribution criteria are used for purposes other than to assess whether a change in control has occurred. The Commission has previously recognized that influence and control are not the same.[20] Accordingly, Commission rules to implement Section 617(a) must be applied so as not to restrict or hamper the transfer of non-controlling interests.[21]

D. Calculation of the three year holding period.

1. Initial construction is complete when a system commences service to its first subscriber.

The Commission requests comment on what date should be used to determine the initial construction of a cable system, and suggests that initial construction may occur upon activation of a

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[19]See Notice at ¶ 12, n. 20.

[20]See News International, PLC, 97 FCC 2d 349, 356 (1984).

[21]For example, while the transfer of 6% of the outstanding common stock of a company would be a transfer of an attributable interest, it is unlikely that the transfer of such interest would result in a change of control.

constructed system, or upon the grant of a franchise.[22] Time Warner believes that Congress, in using the term "initial construction" in Section 617(a), intended something more than merely the grant of the franchise. Time Warner submits that initial construction should be deemed to occur on the date that the system commences service to its first customer. This standard provides a "bright line" test that will, in all cases, be an easily determinable, definite date.

Time Warner believes that its recommended approach is consistent with the use of the words "initial construction" in Section 617(a) and with the Commission's thoughts regarding activation of a constructed system. A "first customer served" test assures that enough of the system will have been constructed to begin providing cable service.[23] In particular, the system would have to have installed a headend and related equipment that constitutes the heart of a system. Moreover, once a system has achieved "initial construction," that status cannot be revoked merely because the system has subsequently been rebuilt or is engaged in on-going line extensions to unserved areas. Such an interpretation would be inconsistent with the concept of <u>initial</u>

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[22]<u>See</u> Notice at ¶ 14.

[23]The Commission uses similar language in 47 C.F.R. § 22.43(c)(2)(i) of its Rules, which requires that "construction of an initial phase of [cellular systems beyond the top-90 markets]" must be completed within 18 months of the date the authorization was granted. Construction of an initial phase means that the operator has put its first customers on the system. <u>Delray Cellular Associates</u>, 4 FCC Rcd 2233 (1989).

construction and would obscure the bright line provided by Time Warner's recommended approach.

Time Warner's proposed definition of "initial construction" would also protect the Commission from becoming embroiled in local disputes regarding whether a particular cable operator had complied with all system construction requirements and timetables which may appear in the local franchise agreement. Not all franchise agreements contain a consistent concept that could define initial construction. Looking to the franchise agreements is, therefore, likely to result in different holding periods for different cable systems with no rational justification for such differences. Finally, cable system operators and franchising authorities may disagree as to satisfaction of any initial construction or primary service requirement in a franchise agreement.

Time Warner also is concerned that reference to franchise agreements could prompt some franchising authorities to attempt to push the holding requirement beyond three years. For example, the franchising authority could delay transfer approvals for substantially constructed systems beyond the 120 days required by Section 617(e); it would simply claim the failure to satisfy the three year holding requirement (i.e., the failure to achieve, or the delay in achieving, "initial construction" status as defined by the franchise agreement) means that the operator is not entitled to the benefit of Section 617(e).

For these reasons, Time Warner believes that reference to the terms and language of franchise agreements most likely would lead to a deluge of requests to the Commission for waivers or interpretations of franchise agreement language. The easily determinable "bright line" test proposed by Time Warner will ensure consistency in the application of the three year rule, provide a reasonable degree of certainty for all system operators, avoid disputes at the local or Commission level, and minimize demands on the Commission's resources.

2. The three year holding period for systems serving a community comprised of multiple franchises should commence upon the acquisition or construction of the first of such franchises acquired or constructed.

Time Warner submits that when a transfer involves a group of franchises which comprise a single technically integrated system from an operating perspective, the three year holding period should be measured from the earliest date of initial construction or acquisition of a franchise in that system by the transferor. That date will best reflect when that operator's system first began to serve the general area now serving multiple franchises. In other words, the commencement of the three year period for a multiple franchise system should be determined in the same way as it would for a single franchise system.

Political boundaries should not define a "system" for purposes of Section 617(a). From a business perspective, multiple franchises served by an integrated system are operated as a single functional unit. As opportunities arise to acquire additional systems in that general area, the operator will see these as opportunities to expand in much the same way that a single franchise operator expands the reach of its plant within its franchise area in order to add new subscribers.

An interpretation of the anti-trafficking rule which makes each additional franchise served by an integrated system to be subject to a separately determined three year holding requirement would serve as a disincentive to the acquisition and consolidation by an operator of additional franchises. In addition, such an interpretation would essentially subject the earliest franchises in that system to a holding period beyond three years, since a single technically integrated system necessarily is sold as a unit, not franchise by franchise.

3. Multiple system transfers.

The Commission seeks comments regarding the appropriate treatment of multiple system transfers under Section 617. The Commission specifically seeks comment on whether separate procedures should be established to determine compliance with the anti-trafficking rule for such transfers. The Commission notes that "it does not appear that the anti-trafficking restriction was meant to forestall [multiple system operator ("MSO")] transfers; however, it is unclear whether the three year holding period must be satisfied for each system owned by an MSO."[24]

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[24]Notice at ¶ 14.

Time Warner concurs in the Commission's view that the anti-trafficking rule should not be read so as to unduly hinder transfers of multiple systems or transfer of an entire multiple system operator ("MSO"), and believes that separate compliance procedures for multiple system transfers are both appropriate and necessary.[25] Time Warner submits that the anti-trafficking rule should not become a device to bar multiple system transfers which parties would otherwise enter into for legitimate business reasons unless such transfer is substantially inconsistent with the three year holding requirement. Time Warner believes that to do otherwise would promote unnecessary inefficiencies and market distortion which would unfairly prevent MSOs from legitimately achieving the highest value for multiple system groups, or from acquiring other MSOs.

The Commission's application of the anti-trafficking rule to multiple system transfers should be guided by a need to apply the rule so as to screen out transactions involving transfers that largely violate the three year holding requirement and to permit legitimate transfers where most, but not necessarily all, of the systems to be transferred have been held by the transferor for at least three years. Time Warner suggests that a materiality threshold be established which could be applied if the transferor

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[25]See discussion regarding a multiple franchise single integrated system at Section I.D.2, supra. If the Commission rejects the approach for such a system recommended therein, the compliance procedures for multiple system transfers recommended in this Section I.D.3 would apply to a multiple franchise single integrated system.

fails to satisfy the three year holding requirement for each system or franchise involved in the transfer.[26] For example, if more than fifty percent (50%) of the actual subscribers in the group of systems to be transferred as of the date of the agreement to transfer are served by systems which have been held by the transferor for at least three years, then the holding period should be deemed satisfied. Use of such a definite approach should minimize uncertainty while not undermining the purported purposes of the three year rule.[27]

Any interpretation of the anti-trafficking rule which requires each system in a transferred group to have been held for three years would unrealistically require MSOs to "freeze" their holdings for three years before they could sell their entire group, or to liquidate their holdings in stages. Either approach is likely to be inefficient for tax and operating purposes and unfairly detrimental to equity holders.[28] Moreover, the

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[26]Time Warner notes that the Commission, in other contexts, has determined that a transfer of a communications system which, taken by itself, might raise trafficking concerns, does not raise such concerns if "the transfer is incidental to a sale of other facilities or merger of interests." McCaw Personal Communications, Inc., 60 RR 2d 889, 893 (1986).

[27]Subscribers, as opposed to homes passed by existing plant, market penetration or percentage of franchise area with access to service, is, again, a "bright line" test that will avoid uncertainty. In any event, the materiality threshold should be established without reference to franchise agreements for the reasons discussed at Section I.D.1, supra.

[28]Presumably, the MSO (or its ultimate parent entity) could effect a "tax-free" transfer excepted by Section 617(c)(1), but there is no reason to force MSOs to restrict their business judgment in this manner.

Commission should not allow the anti-trafficking rule to serve as anti-takeover protection for MSOs. A strict application of the three year holding requirement to every system or franchise in a group could, for example, allow a publicly held MSO to immunize itself from an unsolicited tender or exchange offer, proxy contest or similar challenge by building or acquiring at least one new system every three years.

Applying this same rationale, acquisition of a diversified corporation or entity should be exempt from the three year holding requirement where cable system assets do not constitute a majority of that entity's holdings. In such a situation, even if several systems have been held for less than three years, it is evident that the transaction could not have been motivated by the intent to "traffick" in cable systems. The Commission should establish materiality thresholds based on percentages of such an enterprise's total assets, revenues and/or income that the cable system operations represent, either alone or together with absolute dollar amounts for each, which would permit such transactions to occur without regard for Section 617(a). Alternatively, the Commission should acknowledge that in such circumstances it can and will entertain a request for a waiver under Section 617(d).[29] The Commission could then determine, based on the specific facts and circumstances of the transaction and the enterprise involved, whether granting a waiver was

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[29]<u>See</u> discussion regarding this "general" waiver authority at Section I.F.1, <u>infra</u>.